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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

CLIFFORD SAUNDERS,

Defendant and Appellant.

G049955

(Super. Ct. No. 12WF0282)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, James Edward Rogan, Judge. Affirmed.

Sarita Ordonez, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson, Lynne B. McGinnis, Jennifer B. Truong and Christopher Beesley, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Clifford Saunders of burglarizing an occupied residence (Pen. Code, §§ 459, 460, subd. (a), 667.5, subd. (c)(21); count 1; all further statutory references are to the Penal Code) and of possessing burglary tools (§ 466). Saunders admitted a prior serious felony conviction under section 667.5, subdivision (b). After striking Saunders's prior conviction for sentencing purposes (§ 1385, subd. (c)), the court imposed a four-year term of imprisonment.

Saunders challenges the sufficiency of the evidence to prove his identity as the person who attempted to enter Michael Nguyen's home with felonious intent. He also claims the prosecution failed to prove he possessed instruments or tools with the intent to commit burglary. Neither assertion has merit and we affirm the judgment.

FACTS

In 2012, Nguyen lived with his wife and two young children in a two-story townhouse in Westminster. Nguyen was asleep in his upstairs bedroom one early Sunday morning when he heard noise coming from downstairs. Nguyen got up to investigate and followed the noise to a sliding glass door in the living room. The door led to the backyard of Nguyen's home. Nguyen pushed aside the blinds and turned on an outside light. Through the glass door, Nguyen saw a man crouching down. The man was startled and stood up. Nguyen thought he heard something metal, like a crowbar, hit the ground. He made brief eye contact with the man before the man turned and fled.

Although Nguyen initially gave chase, he quickly decided to go home and call police. Nguyen told investigating officers the man was wearing a black jacket, black jeans, and black baseball cap. Nguyen, at five feet, eight inches tall and weighing 170 pounds, also told the officers the man appeared to be approximately his size and weight.

As Westminster Police Officer David Bedard responded to the call from Nguyen's home, he saw a man in a black jacket speeding down a nearby street on a motorcycle. Bedard turned around to follow the motorcycle, but lost it in traffic. When

Bedard arrived at Nguyen's home, Nguyen described the suspect's clothing, and he told Bedard the man was about his size and might be Hispanic.

Bedard examined the sliding glass door. He noticed approximately 15 pry marks on the door lock and what appeared to be smudge marks on the glass. Bedard decided to retrieve a fingerprint kit from his patrol car. When Bedard was outside, Saunders approached and asked him what had happened at Nguyen's house. Bedard did not respond to Saunders. He went back into the house, but was unable to lift any fingerprints from the glass door.

A little later, as Bedard searched for evidence or witnesses in the area, he found Saunders a few blocks away from the Nguyen home, sitting on a curb. This time, Bedard noticed Saunders's clothing (black jacket and jeans), and he realized Saunders, at about five feet, ten inches tall and weighing about 160 pounds, was roughly Nguyen's size. Bedard also remembered the motorcyclist he had seen earlier was also wearing a black jacket. Bedard approached Saunders and asked him what he was doing. Saunders said he had been with his girlfriend, and he was waiting for a ride from a friend. Bedard mentioned that he was investigating a burglary in the area. Unbidden, Saunders produced a time-stamped receipt (5:26 a.m.) from a nearby Walgreens.

In the meantime, Westminster Police Corporal Phuong Pham drove to the Nguyen home. Pham told Nguyen they wanted him to identify the person if he could. However, Pham also told Nguyen the detained person may or may not be a suspect, and Pham emphasized that it was equally important to exclude potential suspects as it is to identify the criminal. Nguyen indicated he understood and signed a form to that effect.

Pham drove Nguyen to Saunders's location. From about 30 feet away, Pham flashed a spotlight on Saunders. Nguyen quickly said, "[t]hat's him, that's him. That's the guy." Pham asked Nguyen for a certainty assessment, and Nguyen replied that he was "very sure." Bedard asked Saunders for his girlfriend's phone number in an effort to verify Saunders's stated reason for being in the neighborhood. Saunders told him that

he did not know his girlfriend's phone number. Bedard also offered to call Saunders's friend, but Saunders told Bedard his friend was not answering his phone. At this point, Bedard placed Saunders under arrest.

During a search of Saunders's person, Bedard found a ski mask, a bandana, and a pair of black gloves. A search of a black backpack belonging to Saunders yielded an orange nylon bag containing wire cutters, Allen wrenches, a lighter, broken locks, a flashlight, pliers, socket sets, fuses, and a screwdriver. Bedard also saw two keys that he thought looked like "bump keys" or "knox box keys." He explained the difference between bump or knox box keys and other keys (normal keys have varying length teeth while bump or knox box keys have teeth of uniform length), and he explained that the uniform tooth length allows the bump or knox box key to be placed in any lock and "bounce" open the lock.

During a search of the area, officers found a motorcycle registered to Saunders stashed in front of a van parked near the Nguyen's home. There was a red beanie, black motorcycle helmet, and a pair of gloves with the motorcycle. Although attempts were made to obtain DNA evidence from these items, the forensic lab was unable to create a profile from the samples provided.

Nguyen did not identify Saunders at trial. He testified that he had noticed that Saunders was not wearing a cap when he identified him, but Nguyen also said he recognized Saunders's clothing and appearance.

Bedard, a three-year veteran at the time of Saunders's arrest, testified that burglars typically leave their getaway vehicles near the scene of the burglary, often utilize disguises, and frequently carry extra bags to hold stolen goods. Although no one found a crowbar at Nguyen's home, Bedard described the tools found in Saunders's backpack, and he explained burglars often use pocket knives, crowbars, screwdrivers, pliers, hammers, "pretty much anything and everything you can use[,] to gain entry into a home.

DISCUSSION

1. Sufficiency of the Evidence

a. Standard of Review

To assess challenges to the sufficiency of the evidence, we review the whole record to determine whether ““any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.”” (*People v. Maury* (2003) 30 Cal.4th 342, 403.) In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. (*People v. Boyer* (2006) 38 Cal.4th 412, 480 (*Boyer*).) “Issues of witness credibility are for the jury. [Citations.]” (*Ibid.*) If circumstances reasonably justify the trier of facts findings, a reviewing court’s conclusion those same circumstances might reasonably be reconciled with a contrary finding does not warrant reversal of the judgment. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053-1054.)

b. Identity

Saunders acknowledges that the trier of fact is generally charged with making determinations about the credibility of witnesses and the weight of the evidence. However, he claims “evidence of his identity is so weak and unreliable as to not reasonably inspire confidence” or “support the jury’s verdict.” Although Saunders did not move to suppress Nguyen’s identification of him, with laser-like focus he points to Nguyen’s inability to identify him at trial and the fact no one found a crowbar at the scene to question every conceivable aspect of Nguyen’s identification. He claims Nguyen’s description of the suspect was vague and inaccurate, and the in-field identification was unduly suggestive and took place under poor lighting conditions. There are three problems with Saunders’s claim.

First, under the appropriate standard of review, the jury’s view of the evidence prevails. To warrant the rejection of statements given by a witness who has

been believed by the trier of fact, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. (*People v. Thornton* (1974) 11 Cal.3d 738, 754, overruled on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 685.) There is no apparent falsity, nor any physical impossibility in Nguyen's testimony.

Second, "Identification of the defendant by a single eyewitness may be sufficient to prove the defendant's identity as the perpetrator of a crime. [Citation.]" (*Boyer, supra*, 38 Cal.4th at p. 480.) Nguyen told Bedard he saw a man crouched down outside his sliding glass door. The man was startled, as was Nguyen no doubt, but they looked at each other for one brief moment before the man ran away. As Nguyen initially gave chase, he focused on the man's clothing and physical description. Nguyen gave this information to police. Later, when Nguyen saw Saunders at the in-field identification, Nguyen instantly recognized him by his clothing *and* appearance. Shortcomings in the in-field identification process notwithstanding, Nguyen's certainly inspires confidence in his identification of Saunders.

Although Nguyen could not verify his out-of-court identification at trial, this single fact does not warrant reversal. "[A] testifying witness's out-of-court identification is probative for that purpose and can, by itself, be sufficient evidence of the defendant's guilt even if the witness does not confirm it in court. [Citations.] Indeed, 'an out-of-court identification generally has *greater* probative value than an in-court identification, even when the identifying witness does not confirm the out-of-court identification: "[T]he [out-of-court] identification has greater probative value than an identification made in the courtroom after the suggestions of others and the circumstances of the trial may have intervened to create a fancied recognition in the witness' mind. [Citations.] . . ." [Citations.]' [Citation.]" (*Boyer, supra*, 38 Cal.4th at p. 480.)

And, finally, Saunders's eyewitness identification was only one aspect of the prosecution's case. After the crime, Bedard twice noticed Saunders in the area of the

crime. In fact, Saunders approached Bedard and asked him what had happened at the Nguyen home. Bedard did not respond. Later, when he again saw Saunders sitting on a curb, Bedard decided to investigate further. Saunders gave Bedard an explanation for his presence in the neighborhood. However, his alibi proved unverifiable, and considering the fact officers later found Saunders's motorcycle stashed nearby, it was also most likely untrue. We conclude the record contains substantial evidence to prove Saunders's identity as the perpetrator of attempted burglary.

2. *Burglary Tools*

“Section 466 provides in relevant part: ‘Every person having upon him or her in his or her possession a picklock, crow, keybit, crowbar, screwdriver, vise grip pliers, water-pump pliers, slidehammer, slim jim, tension bar, lock pick gun, tubular lock pick, bump key, floor-safe door puller, master key, ceramic or porcelain spark plug chips or pieces, *or other instrument or tool* with intent feloniously to break or enter into any building . . . or vehicle . . . is guilty of a misdemeanor.’ [Citation.] ‘[I]n order to sustain a conviction for possession of burglary tools in violation of section 466, the prosecution must establish three elements: (1) possession by the defendant; (2) of tools within the purview of the statute; (3) with the intent to use the tools for the felonious purposes of breaking or entering.’ [Citation.]” (*People v. Diaz* (2012) 207 Cal.App.4th 396, 400.)

Bedard conceded the tools Saunders possessed were common tools for mechanics, including motorcycle mechanics, and not tools specifically designed to commit burglaries. Grasping at this testimony, and asserting the identification evidence “was improbable and insubstantial,” Saunders claims insufficient evidence proves he possessed normal tools with the intent to use them as burglary tools. Again, the jury took a different view of the evidence. According to the verdict, the jury concluded Saunders attempted to burglarize Nguyen's home, and that he possessed tools with the intent to use them in this endeavor. The record contains substantial evidence to support the jury's conclusion Saunders possessed tools with the intent to use them in burglaries.

DISPOSITION

The judgment is affirmed.

THOMPSON, J.

WE CONCUR:

MOORE, ACTING P. J.

ARONSON, J.